ECORD
AND
RIEFS

FILED
APR 21 2016
OFFICE OF THE CLERK

No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS SUPPORTING PETITIONER

MATTHEW T. MARTENS
Counsel of Record
ASHLEY E. BASHUR
WILLIAM OSBERGHAUS
DANIEL HARTMAN
KEVIN GALLAGHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE DEPARTMENT'S DECISION TO DENY A GRANT TO TRINITY LUTHERAN WAS UNCONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE 5

A. The Department's Decision To Deny The Grant To Trinity Lutheran Is Subject To Strict Scrutiny 6

B. The Department's Policy As Applied To Trinity Lutheran Did Not Satisfy Strict Scrutiny 8

1. The Department has not set forth a compelling governmental interest 9

2. The Department's decision was not narrowly tailored 13

C. Upholding The Eighth Circuit's Decision Could Lead To Unreasonable And Incongruous Results 15

II. THE DEPARTMENT'S DENIAL OF A GRANT TO TRINITY LUTHERAN SOLELY ON THE BASIS OF RELIGION VIOLATED THE EQUAL PROTECTION CLAUSE NOTWITHSTANDING WHETHER IT VIOLATED TRINITY LUTHERAN'S RIGHT TO FREE EXERCISE 19

TABLE OF CONTENTS—Continued

Page

A. The Eighth Circuit Erred By Applying Rational Basis Review To Trinity Lutheran's Equal Protection Claim Instead of Strict Scrutiny 20

1. The Equal Protection Clause requires strict scrutiny of governmental conduct that either violates a fundamental right or classifies along suspect lines 20

2. The Eighth Circuit erred by applying rational basis review to Trinity Lutheran's Equal Protection claim in the absence of a valid Free Exercise claim 22

B. The Department Violated The Equal Protection Clause By Discriminating Against Trinity Lutheran On The Basis Of Its Status As A Religious Organization 25

1. Religion is a suspect classification 26

2. The Department's discriminatory administration of its program cannot withstand strict scrutiny 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Page(s)

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 15

Abrams v. *Johnson*, 521 U.S. 74 (1997) 21

American Atheists, Inc. v. *City of Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009) 12

Ball v. *Massanari*, 254 F.3d 817 (9th Cir. 2001) 26

Board of Education of Kiryas Joel Village School District v. *Grumet*, 512 U.S. 687 (1994) 27

Bronx Household of Faith v. *Board of Education of New York*, 750 F.3d 184 (2d Cir. 2014) 11

Burlington Northern Railroad Co. v. *Ford*, 504 U.S. 648 (1992) 26

Christian Science Reading Room Jointly Maintained v. *City & County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986) 27

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 3, 6, 7, 8, 14

City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) 26

Colorado Christian University v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008) 11

County of Allegheny v. *ACLU*, 492 U.S. 573 (1989) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Employment Division, Department of Human Resources of Oregon v. *Smith*, 494 U.S. 872 (1990) 2, 3, 14

Eulitt ex rel. Eulitt v. *Maine, Department of Education*, 386 F.3d 344 (1st Cir. 2004) 11, 24

Fisher v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) 29, 30

Grutter v. *Bollinger*, 539 U.S. 306 (2003) 29, 30

Hernandez v. *CIR*, 490 U.S. 680 (1989) 4

Hobbie v. *Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) 14

Johnson v. *California*, 543 U.S. 499 (2005) 25

Johnson v. *Robinson*, 415 U.S. 361 (1974) 23, 24

Kreisner v. *City of San Diego*, 1 F.3d 775 (9th Cir. 1993) 10

Locke v. *Davey*, 540 U.S. 712 (2004) ..... *passim*

Luetkemeyer v. *Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973) 6, 9

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 (1976) 20, 21, 25

McDaniel v. *Paty*, 435 U.S. 618 (1978) 7, 14

Midrash Sephardi, Inc. v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) 6

Miller v. *Johnson*, 515 U.S. 900 (1995) 25

Opinion of the Justices, 345 A.2d 412 (N.H. 1975) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Parents Involved in Community Schools v. *Seattle School District No. 1*, 551 U.S. 701 (2007) 29

Patel v. *U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008) 26

Peter v. *Wedl*, 155 F.3d 992 (8th Cir. 1998) 27

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 27

Roemer v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976) 2

Sherbert v. *Verner*, 374 U.S. 398 (1963) 14

Stiles v. *Blunt*, 912 F.2d 260 (8th Cir. 1990) 21

Thomas v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) 14

United States v. *Carolene Products Co.*, 304 U.S. 144 (1938) 27

Widmar v. *Vincent*, 454 U.S. 263 (1981) 3, 9, 10, 29

Wirzburger v. *Galvin*, 412 F.3d 271 (1st Cir. 2005) 21, 24

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 21

STATUTES, RULES, AND REGULATIONS

Mo. Const. art. I, § 7 ..... 2, 5, 6, 7, 8, 30

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Calabresi, Steven G. & Abe Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. 909 (2013) 27

Consumer Financial Protection Bureau, *Should I choose federal student loans or private student loans?*, *available at* http://www.consumerfinance.gov/askcfpb/567/should-i-choose-federal-student-loans-or-private-student-loans.html (last visited Apr. 21, 2016) 17

Department of Environmental Quality, Missouri Department of Natural Resources, *Non-playground and Playground Scrap Tire Material Grants Fiscal Year 2015*, http://dnr.mo.gov/env/swmp/tires/nofa.htm (last visited Apr. 21, 2016) 12

Fahey, Joanne, *Notre Dame reports highest level of research funding in a non-stimulus year*, Notre Dame News, Sept. 19, 2014, *available at* http://news.nd.edu/news/50548-notre-dame-reports-highest-level-of-research-funding-in-a-non-stimulus-year/ 18

Fitzgerald, Laure S., *Towards a Modern Art of Law*, 96 Yale L.J. 2051 (1987) 26

Gellman, Susan & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases*, 10 U. Pa. J. Const. L. 665 (2008) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Lupu, Ira C., *Keeping the Faith: Religion, Equality and Speech*, 18 Conn. L. Rev. 739 (1986) 24

Office of Federal Student Aid, *Public Service Loan Forgiveness Program, available at* https://studentaid.ed.gov/sa/sites/default/files/public-service-loan-forgiveness.pdf (last visited Apr. 21, 2016) 17

Office of Federal Student Aid, *What are the differences between federal and private student loans?, available at* https://studentaid.ed.gov/sa/types/loans/federal-vs-private (last visited Apr. 21, 2016) 18

Smith, Colleen Carlton, Zelman's *Evolving Legacy*, 89 Va. L. Rev. 1953 (2003) 28

Volokh, Eugene, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999) 28

INTEREST OF AMICUS CURIAE

The American Association of Christian Schools (AACS) serves over 800 Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations.[1]

AACS believes the Eighth Circuit's decision below improperly misconstrued this Court's jurisprudence interpreting the Free Exercise and Equal Protection Clauses. AACS is concerned that the erroneous decision, if upheld, could have far-reaching, negative effects on the rights of religious organizations, such as churches and schools, to receive generally available government benefits. AACS thinks it is imperative for this Court to correct the decision below so as to avoid future infringements on religious liberty by the government without requiring a showing of a compelling governmental interest and narrow tailoring. Additionally, AACS believes this Court should confirm that religion as a whole, not just membership in a particular religion, is a suspect classification warranting strict scrutiny under the Equal Protection Clause.

Because AACS serves Christian schools and their students, AACS particularly is concerned with the impact of the Eighth Circuit's decision to the extent it would permit the government to disadvantage religious schools vis-à-vis other private schools.

---

[1] No counsel for a party authored this brief in whole or in part. Nor did counsel for a party, a party, or anyone other than the amicus curiae or its counsel make a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

"[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer* v. *Board of Pub. Works of Md.*, 426 U.S. 736, 746 (1976). Indeed, the Free Exercise Clause precludes the government from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Res. of Ore.* v. *Smith*, 494 U.S. 872, 877 (1990).

Trinity Lutheran Church of Columbia (Trinity Lutheran) and The Learning Center, which Trinity Lutheran operates as a religious school, applied for a grant to fund the installation of safe, rubber playground surfaces that would serve to protect children who use its playground. The Scrap Tire Surface Material Grant Program is generally available to nonprofit organizations; however, Trinity Lutheran's application for a grant was denied by Missouri's Department of Natural Resources (Department) solely because Trinity Lutheran is a church. The Department based its decision on a provision of the Missouri Constitution, which provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." Mo. Const. art. I, § 7 (Section 7).

Trinity Lutheran challenged the rejection of its grant application as violative of the Free Exercise and Equal Protection Clauses, but the Eighth Circuit held that the Department did not violate either of these constitutional provisions. The Eighth Circuit's holdings were based on a misconstruction of this Court's precedents and should be reversed.

First, because the Department's policy (based on Section 7) of rejecting churches' grant applications is

neither neutral nor generally applicable, the proper test for evaluating the policy as applied to the denial of Trinity Lutheran's grant application is strict scrutiny, as established by this Court in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). The Department has not met this high burden, because it has not set forth a compelling governmental interest. This Court has stated that imposing greater separation of church and state than the Establishment Clause requires is not a sufficiently compelling government interest. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981). But even were a compelling governmental interest present here, the denial of Trinity Lutheran's grant application because of its status as a church—irrespective of the particulars of the use to which the grant would be put—is not the narrow tailoring that strict scrutiny requires.

In support of its decision, the court below relied in part on *Locke* v. *Davey*, 540 U.S. 712 (2004), in which this Court upheld a scholarship program that prohibited students from using the scholarships to pursue devotional theology degrees. Reliance on *Locke* is inapt, however. In *Locke*, the state had a longstanding and specific interest in not funding the religious training of clergy. There are no such similar concerns here, where the grants may only be used for one secular purpose—to install scrap tire material on playgrounds.[2] Addi-

---

[2] We note that a secular purpose is not required under the standard articulated in *Locke*, which contemplated that funding for religious activities may be acceptable. *See Locke*, 540 U.S. at 724-725 (noting the permissibility of students' using the scholarships while attending "pervasively religious schools" or taking devotional theology courses). Further, this Court has held on numerous occasions that the government is not the arbiter of what is secular or religious. *See Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim."); *see also*

tionally, unlike in *Locke*, the Department here categorically excluded churches from participation in its program regardless of the use to which the playground is put and thus did not narrowly tailor its exclusion to any governmental interest. The *Locke* decision, if anything, highlights the problem with this application of Missouri's constitutional provision.

Furthermore, upholding the Eighth Circuit's decision could jeopardize government benefits for other religious organizations such as schools. This precedent could encourage states to require religious institutions to reimburse the state for even critical public services that are otherwise generally available. And it is not too hard to imagine a world in which the government could deny religious institutions access to many other generally available services simply because of the religious character of those institutions.

Second, the Department's discrimination against Trinity Lutheran on the basis of its status as a church violated the Equal Protection Clause. The Eighth Circuit erred in applying rational basis review to Trinity Lutheran's Equal Protection claim simply because its Free Exercise claim failed. To the extent that Trinity Lutheran's Equal Protection claim is premised on its membership in a suspect class, the court below should have analyzed the claim separately from its Free Exercise claim. And such a claim requires application of strict scrutiny given that religion is a suspect class. Because the Department was unable to set forth a compelling governmental interest to justify its discrimination against churches, and because the grant pro-

---

Hernandez v. *CIR*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question ... the validity of particular litigants' interpretations of [their] creeds.").

gram was not narrowly tailored to advance any such interest, this Court should hold that the Department's conduct violated the Equal Protection Clause.

ARGUMENT

I. THE DEPARTMENT'S DECISION TO DENY A GRANT TO TRINITY LUTHERAN WAS UNCONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE

The Department's policy of denying churches' grant applications solely because of their religious status is, as applied to Trinity Lutheran, unconstitutional under the Free Exercise Clause. The Department's policy is premised on Section 7, which provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Mo. Const. art. I, § 7. The Department cited this state constitutional provision as its sole basis for denying the grant to Trinity Lutheran. The Department's decision was not based upon any religiously neutral or generally applicable criteria, and, but for the fact that it was a church, Trinity Lutheran would have received the grant. Under this Court's Free Exercise Clause precedent, the Department's application of Section 7 to deny the grant to Trinity Lutheran is subject to strict scrutiny.[3] Because the Department's conduct cannot meet

---

[3] The Eighth Circuit incorrectly concluded that Trinity Lutheran's challenge to Section 7 was a facial challenge, instead of an

this exacting standard, the Court should hold that it violated the Free Exercise Clause.

A. The Department's Decision To Deny The Grant To Trinity Lutheran Is Subject To Strict Scrutiny

State action that is not neutral or generally applicable, such as the Department's policy of denying grant applications to religious institutions, must satisfy strict scrutiny under the Free Exercise Clause. In combination with *Smith*, *Lukumi* stands for the proposition that laws or other state actions that are not neutral or generally applicable are subject to strict scrutiny. *See, e.g.*, *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("After *Smith*, it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny."). Specifically, this Court held in *Lukumi* that official action "burdening religious practice that is not neutral or not of general application must undergo *the most rigorous of scrutiny*." *Lukumi*, 508 U.S. at 546 (emphasis added). As a result, such an action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests" to satisfy the commands of

---

as-applied challenge, and therefore held that Section 7 "does not conflict with the First Amendment or the Equal Protection Clause of the United States Constitution." Pet. App. 11a (citing *Luetkemeyer* v. *Kaufmann*, 64 F. Supp. 376 (W.D. Mo. 1973), *summarily aff'd*, 419 U.S. 888 (1974)). The court's conclusion was erroneous because Trinity Lutheran clearly brought an as-applied challenge. *See, e.g.*, *id.* 106a, 111a, 112a (alleging "Defendant['s] ... unconstitutional application of" Section 7); *id.* 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing [Section 7] by denying Plaintiff's grant application"). Therefore, the Eighth Circuit's analysis and holding were both inapt and incorrect, and this Court should properly analyze Trinity Lutheran's claims as applied to the Department's administration of the program.

the Free Exercise Clause. *Id.* (citing *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)).

The Department's policy, based on Section 7, is neither neutral nor generally applicable with respect to religion. Accordingly, the Department's decision to deny the grant to Trinity Lutheran is subject to strict scrutiny, which requires that the Department's application of Section 7 "be justified by a compelling governmental interest and ... be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-532. As this Court has recognized, such an action "that targets religious conduct for distinctive treatment ... will survive strict scrutiny only in rare cases." *Id.* at 546.

In *Lukumi*, the Court held that municipal ordinances that prohibited animal sacrifice unconstitutionally violated the free exercise rights of Santeria adherents, for whom "[t]he sacrifice of animals as part of religious rituals has ancient roots." *Lukumi*, 508 U.S. at 524. The ordinances were neutral because they used secular terminology that did not refer to religious practices. *Id.* at 534. The Court nonetheless applied strict scrutiny to the ordinances because the Court concluded, upon conducting a thorough analysis, that the ordinances, in fact, targeted religious conduct for differential treatment and were not generally applicable. *See id.* at 533-542.

Here, unlike in *Lukumi*, there is no need for the Court to evaluate the motive underlying the denial of the grant application because the Department plainly stated the basis for its denial, namely the requirements of Section 7. In this case, the Department explicitly singled out churches and other religious entities for differential treatment; in fact, they are targeted and excluded on the basis of the religious practices in which

they are engaged. There is also no question that the Department's decision is not generally applicable for the same reason: it prohibits aid to churches and other religious entities only. As the Court recognized in *Lukumi*, "[n]eutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 531.

As the Department has conceded, *but for* Trinity Lutheran's status as a church, it would have received the grant. *See* Br. in Opp. 2. As a result, the Department's denial of Trinity Lutheran's grant application was not the result of a religiously neutral decision based on a generally applicable rule of decision.

B. The Department's Policy As Applied To Trinity Lutheran Did Not Satisfy Strict Scrutiny

Because the denial of Trinity Lutheran's grant application was not based on religiously neutral grounds, that decision must satisfy strict scrutiny, meaning that the Department's decision "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-532. The Department has not carried its burden of meeting that standard here. Excluding Trinity Lutheran from participating in an otherwise generally available program that offers grants for playground surfacing does not further a compelling government interest and is not narrowly tailored to achieving any compelling government interest. Invoking Section 7 to deny the grant to Trinity Lutheran cannot satisfy strict scrutiny.

1. The Department has not set forth a compelling governmental interest

The Department has asserted an interest that is not compelling in the First Amendment context. In its motion to dismiss, the Department asserted an interest in Missouri's "insistence on a high degree of separation of church and state," which it characterized to be "arguably higher than that required by the First Amendment." Mot. to Dismiss 3, Dist. Dkt. 9. The Department cited one decision, a district court decision from 1973, to support the proposition that this interest is a compelling one: *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376, 386 (W.D. Mo. 1973), *summarily aff'd*, 419 U.S. 888 (1974). In *Luetkemeyer*, a district court upheld a Missouri statute that provided transportation for students to and from public schools but not "church-related schools." *Id.* at 377. While the district court did conclude that "the long established constitutional policy of the State of Missouri, which insists upon a high degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling government interest,'" *id.* at 386, its conclusion is significantly undermined by later Supreme Court precedent that makes clear that imposing greater separation of church and state than the Establishment Clause requires is not a sufficiently compelling government interest under the First Amendment.

For example, in *Widmar* v. *Vincent*, this Court considered the constitutionality of a University of Missouri-Kansas City (UMKC) regulation that closed facilities it made generally available to registered student groups to one particular registered student group that sought to use those facilities for "religious worship and religious discussion." 454 U.S. at 264-265, 277. UMKC

asserted that the regulation at issue furthered its interest in "maintaining strict separation of church and State" under both the United States and Missouri constitutions. *Id.* at 269. The Court affirmed the Eighth Circuit's decision that the regulation was not justified by a compelling interest and thus was unconstitutional. *See id.* at 267, 275-276. Specifically, the Court concluded that a state interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution [] is limited by the Free Exercise Clause[.]" *Id.* at 276. So too here the Free Exercise Clause limits the Department's stated interest in maintaining a high degree of separation of church and state. *See also Kreisner* v. *City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993) ("[E]ven though the California Constitution's provision prohibiting governmental establishment or preference of religion may be broader than the United States Constitution, it, like the Establishment Clause of the Federal Constitution, must be limited by the Free Exercise Clause[.]"). The Department's denial of the grant to Trinity Lutheran, therefore, fails strict scrutiny for the simple reason that it does not put forward a cognizable compelling interest.

Even if the Court were to conclude now that Missouri has an interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution," *Widmar*, 454 U.S. at 277, that interest is less than compelling when applied to the facts of this case. In fact, it is far less "substantial" than the State's interest in *Locke*.

In *Locke*, "the only interest at issue ... [wa]s the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5. The Court noted that "majoring in devotional theology is akin to a religious call-

ing as well as an academic pursuit." *Id.* at 721. Citing the historical concerns about the use of taxpayer funds to "support church leaders," *id.* at 722, the Court characterized that governmental interest as "historic and substantial." *Id.* at 724. In fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." *Id.* at 722.[4]

The Department has not asserted the existence of any such "historic and substantial state interests." In this case, there are no specific antiestablishment concerns similar to Washington's longstanding "interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5.[5] Trinity Lutheran seeks to ensure that

---

[4] *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (internal citation omitted; brackets in original). Further, the Court's "holding that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Id.* at 1255-1256 (brackets in original). The Eighth Circuit's opinion rests, in part, on "existing precedent" that does not appreciate these limitations to the Court's analysis in *Locke*. *See* Pet. App. 12a (citing *Bronx Household of Faith* v. *Board of Educ. of N.Y.*, 750 F.3d 184, 198 (2d Cir. 2014), and *Eulitt ex rel. Eulitt* v. *Maine, Dept. of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004)).

[5] The Eighth Circuit suggested that, in this case, Trinity Lutheran sought "to compel the direct grant of public funds to churches," which the court characterized as "another of the 'hallmarks of an "established" religion.'" Pet. App. 10a. However, as Judge Gruender noted in his dissent, this Court "has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—

children playing on its playground are safe. Unlike the state's interest in *Locke* in ensuring that its funds not be used for religious training of clergy, there is nothing uniquely religious about playgrounds, even those at religious institutions, that would give the Department a compelling interest in limiting the use of its grants for such. The grant at issue is available through a secular, generally available program and may be used only for one secular purpose: "the cost, delivery, vendor installation of scrap tire surface material for playgrounds only."[6] Thus, the grants may not be used for religious purposes, such as to purchase religious materials, subsidize religious instruction, or train religious leaders. In no way is Trinity Lutheran seeking to use state funds for an "essentially religious endeavor." *See Locke*, 540 U.S. at 721. It is difficult to conceive in these circumstances how a reasonably objective observer could believe that the Department was endorsing religion or otherwise advancing religious practice by providing a grant so that children could play safely on a church playground. The Department's interest in this case is not sufficiently compelling to satisfy strict scrutiny.

---

where the aid itself had no religious content and any actual diversion was de minimis." *American Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 295 (6th Cir. 2009). "Although private choice is one way to break the link between government and religion, it is not the only way." *Id.*

[6] Dep't of Envtl. Quality, Missouri Dep't of Nat. Res., *Non-playground and Playground Scrap Tire Material Grants Fiscal Year 2015*, http://dnr.mo.gov/env/swmp/tires/nofa.htm (last visited Apr. 21, 2016).

2. The Department's decision was not narrowly tailored

Categorically excluding churches from participating in a public program that offers grants for playground surfacing so that children can play safely is also not narrowly tailored to achieving any alleged compelling government interest. In attempting to further the separation of church and state, the Department chose to use a sledgehammer when all it needed was a scalpel.

The Promise Scholarship Program, which the Court upheld in *Locke*, provides an example of a state program tailored to the asserted government interest at issue. The Promise Scholarship Program was tailored to "the State's interest in not funding the religious training of clergy," *Locke*, 540 U.S. at 722 n.5, because students were prohibited from using the scholarship funds *only* while pursuing "vocational religious instruction," *id.* at 725. Students could still use the scholarships while attending "pervasively religious schools," *id.* at 724, and students could also still use the scholarships to take devotional theology courses generally, *id.* at 725. Indeed, the only barred conduct was pursuing a degree in devotional theology, which the Court considered to be a "relatively minor burden" on scholarship recipients. *Id.*

Far from going "a long way toward including religion in its benefits," *Locke*, 540 U.S. at 724, the Department here demonstrated its disfavor of religion by categorically excluding churches from receiving otherwise neutral and generally available government benefits, even though, under the terms of the program, an institution receiving a grant may only use it for one secular purpose: installing scrap tire surface material for playgrounds.

In fact, the only way for Trinity Lutheran to receive generally available government benefits under the grant program would be for it to forgo its religious beliefs. *See, e.g., Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Thus, the grant program unconstitutionally subjects Trinity Lutheran to a Hobson's choice: either forgo its religious beliefs in order to receive generally available government benefits, or forgo the government benefits so that it may adhere to its religious beliefs.

Unlike in *Locke*, the Department categorically excluded churches from participation in its benefit program. The disfavor of religion the Department expressed was far from mild; it can only be characterized as intense.[7]

The grant program would be better tailored to furthering the Department's stated interest of separating church and state if it, for example, allowed the participation of churches in the Program so long as they did not use the public benefits for religious activities. Rather than carefully attempting to craft a program narrowly tailored to further its alleged interest of separating church and state, the Department missed the mark by categorically excluding churches like Trinity Lu-

---

[7] Further, the Department subjects churches to differential treatment based upon their status as churches. The Department may not exclude Trinity Lutheran from participating in a generally available government program simply because it is a church. *See, e.g., Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 877 ("The government may not ... impose special disabilities on the basis of religious views or religious status[.]" (citing *McDaniel*, 435 U.S. 618 (1978))).

theran from receiving a grant. This action cannot withstand strict scrutiny under this Court's jurisprudence.

C. Upholding The Eighth Circuit's Decision Could Lead To Unreasonable And Incongruous Results

The Eighth Circuit stated that "the direct expenditure of public funds to aid a church is a paradigm example" of state action not required by the Free Exercise Clause. Pet. App. 12a. But allowing the state to withhold direct expenditures of generally available public funds to churches solely because they are churches without requiring the showing of a compelling governmental interest and narrow tailoring could lead to unreasonable and unprecedented results. As Justice Goldberg warned, an "untutored devotion to the concept of neutrality can lead to the ... approval of results which partake ... of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring).

Government programs and services increasingly are becoming a part of American life. Entire sectors of the economy, such as healthcare and student loans, are becoming more dependent on government programs and services. And "as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *County of Allegheny* v. *ACLU*, 492 U.S. 573, 657-658 (1989) (Kennedy, J., concurring). Upholding the Eighth Circuit's decision could allow governments, in the name of neutrality, to deny religious

groups from large swaths of government programs and services.

The Eighth Circuit's decision, if it stands, could allow federal, state, and local governments to prohibit extending a number of different benefits critical to religious schools at the state level. This precedent could encourage states to require religious institutions to reimburse the state for even critical public services that are otherwise generally available and jeopardize certain state programs that provide healthcare services to students at religious schools.[8] Allowing the Eighth Circuit's decision to stand could allow for movement down the slippery slope toward preventing religious schools from receiving *any* governmental benefits, which could dissuade some families from sending their children to these schools and impede their free exercise of religion.

For example, it could have the unintended effect of allowing the government to prohibit the Department of Education from providing critical federal student loans, including Federal Pell Grants, to students admitted to attend religiously-affiliated schools, such as Brigham Young University, Georgetown, and Yeshiva University. The Department of Education's Public Service Loan Forgiveness Program, which forgives the entire remaining debt of federal student loan borrowers who work in full-time "public service" careers for 120 months, already excludes religious careers from its def-

---

[8] For example, New Hampshire public schools provide health services to religious school students requesting such services. *See Opinion of the Justices*, 345 A.2d 415 (N.H. 1975) (advisory opinion).

inition of "public service" while still including full time employment at private not-for-profit organizations.[9]

And the potential impact is not limited to student loans, but to the continuation of religious higher education more broadly. Today, every American college student who requires a loan to fund his or her education has few private options outside of federal student loans unless he or she is willing to pay a premium. The federal student loan program has become so favorable, with benefits like fixed interest rates and income-based repayment plans, that financial experts and consumer advocacy groups (including the Consumer Financial Protection Bureau) advise student borrowers not to consider taking private loans until they have maxed out their federal loans.[10] As a result, many college students who require loans to afford college depend on government programs to continue their education.[11]

---

[9] "For purposes of the full-time requirement, your qualifying employment at a not-for-profit organization does not include time spent participating in religious instruction, worship services, or any form of proselytizing." Office of Federal Student Aid, *Public Service Loan Forgiveness Program* 3, *available at* https://studentaid.ed.gov/sa/sites/default/files/public-service-loan-forgiveness.pdf (last visited Apr. 21, 2016).

[10] Consumer Financial Protection Bureau, *Should I choose federal student loans or private student loans?*, *available at* http://www.consumerfinance.gov/askcfpb/567/should-i-choose-federal-student-loans-or-private-student-loans.html (last visited Apr. 21, 2016) ("If you must take out student loans, federal student loans are the best option for the vast majority of borrowers. It is best to max out your federal student loan options before you borrow any private student loans.")

[11] Unlike private student loans, federal student loans do not require a credit check for applicants, and federal student loans offer special benefits such as income-based repayment plans, favorable default resolution options like loan rehabilitation and consolida-

Affirming the Eighth Circuit's decision could allow the government to foreclose students at Christian colleges from participating in student loan programs. These colleges could lose much more than just loan money—their research grant money, scholarships, and tax benefits could also be at risk.[12] There are currently very few colleges nationwide that do not receive any government money (and zero who do not benefit from the government in some way), and a decision affirming the Eighth Circuit's ruling could allow the government, should it see fit, to effectively close the doors of many of this country's educational institutions simply because of their religious character.[13]

Just as "no one would seriously contend ... that the Framers would have barred ministers from using public roads on their way to church," *Locke*, 540 U.S. at 727-728 (Scalia, J., dissenting), the Framers similarly

---

tion, and even loan forgiveness. Office of Federal Student Aid, *What are the differences between federal and private student loans?*, *available at* https://studentaid.ed.gov/sa/types/loans/federal-vs-private (last visited Apr. 21, 2016). Also, all federal student loans charge a fixed rate (typically lower than private loans) and do not require a co-signer, while private student loans include variable rates (as high as 18%) and may require a co-signer. *Id.*

[12] For example, 52% of the $113 million Notre Dame received in research grants in 2014 was from the federal government. Fahey, *Notre Dame reports highest level of research funding in a non-stimulus year*, Notre Dame News, Sept. 19, 2014, *available at* http://news.nd.edu/news/50548-notre-dame-reports-highest-level-of-research-funding-in-a-non-stimulus-year/.

[13] Indeed, even religious colleges that do not accept federal funding benefit from the government in other respects. For example, religious colleges receive protection by police and fire departments, use government water and sewer systems, and rely on the upkeep of public roads or sidewalks providing access.

could not have envisioned a world in which the government could have barred Notre Dame's team bus from using the same public roads as the University of Southern California's team to travel to a Saturday night football game simply because of its religious affiliation.

This Court has recognized the dangers of an inflexible commitment to neutrality, and upholding the Eighth Circuit's decision could exacerbate those dangers not only for churches, but also for religious schools, hospitals, and other groups.

II. The Department's Denial Of A Grant To Trinity Lutheran Solely On The Basis Of Religion Violated The Equal Protection Clause Notwithstanding Whether It Violated Trinity Lutheran's Right To Free Exercise

The Eighth Circuit's opinion below incorrectly downgraded the Equal Protection Clause to merely a shadow incapable of operating apart from the Free Exercise Clause when the court stated that "in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection Claim is governed by rational basis review." Pet. App. 12a. In other words, in the Eighth Circuit's view, because it held that the Department did not violate Trinity Lutheran's fundamental right to exercise freely its religious beliefs, Trinity Lutheran's Equal Protection claim was subject only to rational basis review and accordingly must fail. In so holding, the court below ignored Trinity Lutheran's basis for its Equal Protection claim—that it was improperly discriminated against because of its membership in a suspect class—which is not dependent on its assertion that the Department violated its Free Exercise rights. Furthermore, this Court has made clear that Equal Protec-

tion claims and Free Exercise claims are separate and distinct: A claim brought under one clause does not necessarily rise and fall with a claim brought under the other clause.

This Court should correct the Eighth Circuit's error and reiterate to the lower courts that each constitutional claim brought by a plaintiff warrants its own analysis. Moreover, this Court should hold that the Department's discrimination against Trinity Lutheran on the basis of its status as a religious entity violated the Equal Protection Clause because this disparate treatment of a suspect classification does not serve a compelling state interest and the program is not narrowly tailored to any such interest.

A. The Eighth Circuit Erred By Applying Rational Basis Review To Trinity Lutheran's Equal Protection Claim Instead Of Strict Scrutiny

1. The Equal Protection Clause requires strict scrutiny of governmental conduct that either violates a fundamental right or classifies along suspect lines

The Eighth Circuit failed to recognize that the Equal Protection Clause protects against two separate categories of governmental actions: (1) interference with the exercise of a fundamental right or (2) disadvantage of a suspect classification. When the government engages in either one of these two types of actions, its conduct must meet the exacting strict scrutiny standard. *See, e.g., Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification ... when the classification impermissibly interferes with the exercise of a fundamental right or operates to the

peculiar disadvantage of a suspect class."). Strict scrutiny requires that a government action "must be narrowly tailored to serve a compelling governmental interest in order to survive." *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997).

Based completely on their own prerogative, plaintiffs may bring an Equal Protection challenge on the basis of an interference with a fundamental right, a suspect classification, or both. *See, e.g.*, *Stiles* v. *Blunt*, 912 F.2d 260, 264 (8th Cir. 1990) ("Appellant argues that the minimum age requirement should be subjected to strict scrutiny review because the requirement affects a suspect class and infringes on fundamental rights."). Therefore, for religious-based Equal Protection challenges, plaintiffs can argue that the government interfered with their fundamental right to free exercise of religion and/or that they were disadvantaged due to a suspect classification predicated on religious grounds.[14] *See, e.g.*, *Wirzburger* v. *Galvin*, 412 F.3d 271, 282 (1st Cir. 2005) ("Plaintiffs argue that the Religious Exclusion violates equal protection guarantees because it infringes on the fundamental right to religious free exercise [and] disadvantages a suspect class."). Either one of these types of claims triggers strict scrutiny. *Murgia*, 427 U.S. at 312.

---

[14] The free exercise of religion is certainly a fundamental right. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). This brief, however, focuses on Trinity Lutheran's suspect classification claim.

2. The Eighth Circuit erred by applying rational basis review to Trinity Lutheran's Equal Protection claim in the absence of a valid Free Exercise claim

Rather than apply strict scrutiny to Trinity Lutheran's suspect classification Equal Protection claim, the Eighth Circuit applied rational basis review and summarily rejected the claim for the same reasons it had rejected Trinity Lutheran's Free Exercise claim. *See* Pet. App. 12a. This holding was based on a misconstruction of this Court's precedent and constitutes reversible error.

Trinity Lutheran brought a claim that the Department violated its Equal Protection rights because the Department denied Trinity Lutheran's grant application on the basis of a suspect classification. *See* Compl. ¶¶ 51-61, Dist. Dkt. 1; *see also id.* ¶ 55 ("Religion is a suspect class."). But instead of analyzing the claim separately, the court rejected the Equal Protection claim as concomitant with the Free Exercise claim, stating, "in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection claim is governed by rational basis review." Pet. App. 12a n.3 (citing *Locke*, 540 U.S. at 720 n.3).

The Eighth Circuit's justification for its method of handling Trinity Lutheran's Equal Protection claim lacks support in this Court's precedent. The reliance on *Locke* is inapt because, in that case, the Court was merely addressing an Equal Protection claim premised on a classification that interferes with the *exercise of a fundamental right, not a claim premised on a classification that operates to the disadvantage of a suspect class*, as Trinity Lutheran argues here. Because the *Locke* Court held that the program at issue there

"[wa]s not a violation of the Free Exercise Clause," the Court applied "rational-basis scrutiny to [respondent's] equal protection claims." *Locke*, 540 U.S. at 720 n.3.

In so doing, the Court in *Locke* cited *Johnson* v. *Robinson*, 415 U.S. 361 (1974), as its sole authority. In *Johnson*, the petitioner argued both that the challenged classification interfered with the fundamental constitutional right to the free exercise of religion *and* that conscientious objectors were a suspect class deserving special judicial protection. *Id.* at 375 n.14. The Court analyzed these claims separately, first noting that since it had held "that the Act does not violate appellee's right of free exercise of religion," it could not apply to the fundamental right claim "a standard of scrutiny stricter than the traditional rational-basis test." *Id.* It then proceeded to *separately* analyze the claim that conscientious objectors were a suspect class. *Id.*

Thus, to the extent that *Locke* and *Johnson* can be read to make an Equal Protection claim dependent on the viability of a Free Exercise claim, this would be true when the Equal Protection claim is premised *only* on an interference with a fundamental right, as in *Locke*. But the Court in *Johnson* separately analyzed a suspect classification claim on its own terms. Thus, the Eighth Circuit erred in its reliance on *Locke* as support for applying rational basis review to Trinity Lutheran's suspect classification claim. An Equal Protection claim that is premised on a suspect classification stands alone and apart from any Free Exercise claim and is subject to strict scrutiny.

Furthermore, as a general matter, Equal Protection claims and Free Exercise claims are separate and distinct; a claim brought under one clause does not necessarily rise and fall with a claim brought under the

other. An Equal Protection claim premised on a suspect classification and a First Amendment claim premised on free exercise of religion are seeking unrelated remedies from different vantage points. The "individualized notion of impact is what constitutes the essential difference between adjudication under the free exercise clause and the equal protection clause." Lupu, *Keeping the Faith: Religion, Equality and Speech*, 18 Conn. L. Rev. 739, 765 (1986). Free Exercise claims are premised on protecting "autonomous, individual choices," whereas Equal Protection claims based on a suspect classification are "dependent on group membership." *Id.* Trinity Lutheran's suspect classification claim, therefore, must be evaluated in a completely separate manner from its Free Exercise claim.

A failure to evaluate separately Trinity Lutheran's suspect classification Equal Protection Clause claim wrongly creates "a blanket rule that where a Free Exercise claim fails, all equal protection claims based on the same facts must also fail." *Wirzburger*, 412 F.3d at 282 n.5. Rather, this Court should clarify that the *Locke-Johnson* "line of Supreme Court cases [applies] only to the extent that the related equal protection claims are based on a theory that the law or governmental action in question 'interferes with the fundamental constitutional right to the free exercise of religion.'" *Id.* (quoting *Johnson*, 415 U.S. at 375 n.14). Indeed, other types of Equal Protection claims, such as suspect classification claims, "may have independent force, and must be considered accordingly." *Id.* This Court should reaffirm this principle, as lower courts have strayed from it. *See, e.g.*, *Eulitt*, 386 F.3d at 354 ("In [*Locke*], the Supreme Court clearly rejected this type of effort to erect a separate and distinct frame-

work for analyzing claims of religious discrimination under the Equal Protection Clause.").

The Eighth Circuit erred by applying rational basis review to and summarily disposing of Trinity Lutheran's Equal Protection claim. This Court should clarify that courts must conduct a separate analysis for each constitutional claim.

B. The Department Violated The Equal Protection Clause By Discriminating Against Trinity Lutheran On The Basis Of Its Status As A Religious Organization

Analyzed properly on its own merits, Trinity Lutheran's Equal Protection claim triggers strict scrutiny if it evokes a viable suspect classification. "[E]qual protection analysis requires strict scrutiny of a legislative classification [] when the classification ... operates to the peculiar disadvantage of a suspect class." *Murgia*, 427 U.S. at 312. The Department rejected Trinity Lutheran's grant *solely* because of its status as a church, the quintessential religious organization. Thus, the Department's application of its program operated to the peculiar disadvantage of religious organizations because all churches would likewise be categorically barred from participating. And because religion is a suspect classification, the Department's classification therefore must pass the strict scrutiny test: "the government has the burden of proving that [the] classifications are narrowly tailored measures that further compelling governmental interests." *Johnson* v. *California*, 543 U.S. 499, 505 (2005). The classification at issue clearly fails this Court's "most rigorous and exacting standard of constitutional review." *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995).

1. Religion is a suspect classification

To be deemed a suspect classification, a government's classification must be based on characteristics that are essential elements of personhood and focal points of discrimination. *See, e.g.*, Fitzgerald, *Towards a Modern Art of Law*, 96 Yale L.J. 2051, 2072 & n.9 (1987). "Establishing that religion is a 'suspect classification' for equal protection purposes is easy"; indeed, "it has always been *assumed* that classification based on religion is suspect." Gellman & Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Clause Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665, 707 (2008).

This Court has stated in several cases that religion is a suspect classification. *See, e.g.*, *Burlington N. R.R. Co.* v. *Ford*, 504 U.S. 648, 651 (1992) (Equal Protection Clause prohibits classification "along suspect lines like race or religion"); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (Equal Protection Clause prohibits classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage"). Circuit courts likewise have stated that religion is a suspect classification. *See, e.g.*, *Patel* v. *U.S. Bureau of Prisons*, 515 F.3d 807, 816 (8th Cir. 2008) ("Religion is a suspect classification."); *Ball* v. *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (listing "race, religion, or national origin" as suspect classes). That religion is a suspect classification is essentially a truism.

Furthermore, religion should be considered a suspect classification regardless of whether "religion" is defined as an individual denomination or all religions together, such as here, where Trinity Lutheran was denied the grant solely because of its status as a religious organization. It is clear that "an individual reli-

gion meets the requirements for treatment as a suspect class." *Christian Sci. Reading Room Jointly Maintained* v. *City & Cnty. of S.F.*, 784 F.2d 1010, 1012 (9th Cir. 1986). This is so because individual religions are often "discrete and insular" minorities in need of "extraordinary protection from the majoritarian political process" such that classifications based on individual religions are inherently suspect. *See United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-153 n.4 (1938) (noting that statutes directed at particular religious minorities must be subjected to "more exacting judicial scrutiny" under the Fourteenth Amendment).

But because the Court in "footnote four" of *Carolene Products* cited *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), which is "a case involving a law which burdened all religious groups generally," that footnote also demonstrates that "the Fourteenth Amendment banned laws targeting *all religion generally*, and not just laws targeting specific religious groups." Calabresi & Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. 909, 1006 (2013) (emphasis added). Indeed, since *Carolene Products*, the Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring). "This emphasis on equal treatment is ... an eminently sound approach" because constitutional provisions such as "the Equal Protection Clause as applied to religion ... speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Id.* Lower court decisions have demonstrated this principle as well. *See, e.g.*, *Peter* v. *Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (program

that allowed children who attended private nonreligious schools to receive government-funded special education services while barring the same services at religious schools was "[g]overnment discrimination based on religion" that violated the Equal Protection Clause).

These principles have led scholars analyzing this issue to the same, inescapable conclusion: Religion as a whole is a suspect classification. "[E]vidence indicates that classifications either targeting particular religions or distinguishing between religion and secularism will be subjected to strict scrutiny." Smith, Zelman's *Evolving Legacy*, 89 Va. L. Rev. 1953, 1995 (2003). Eugene Volokh agrees, further explaining that "equal treatment is constitutionally compelled: The government may not discriminate against people or institutions because of their religiosity." Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 365 (1999).

Religion as a whole, therefore, is a suspect classification, and this suspect classification was triggered by the Department's actions. Even though the Department denied Trinity Lutheran the grant because it is a religious organization (and not because it belongs to the Lutheran denomination or is a Christian church), this classification of organizations along purely religious lines is inherently suspect. Because the Department's actions worked to the disadvantage of a suspect classification, the Court must apply strict scrutiny to Trinity Lutheran's claim.

2. The Department's discriminatory administration of its program cannot withstand strict scrutiny

The Department fails at either step required to pass strict scrutiny. First, it cannot show a compelling gov-

ernmental interest. In the district court, the Department argued that "Trinity's exclusion from the aid program in this case was based on the Missouri Constitution's heightened separation of church and state." Pet. App. 70a. This Court, however, has held that the mere state interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" is not "sufficiently compelling to survive strict scrutiny." *Widmar*, 454 U.S. at 276-277. The Department's classification, therefore, fails strict scrutiny for the simple reason that it does not put forward a cognizable compelling interest. *See, e.g., Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 757 (2007) ("Lacking a cognizable interest in remediation, neither of these plans can survive strict scrutiny because neither plan serves a genuinely compelling state interest.").

Even if the Department could somehow put forward a compelling interest, the "government is still constrained in how it may pursue that end: The means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Grutter* v. *Bollinger*, 539 U.S. 306, 333 (2003). "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate [] prejudice or stereotype." *Id.* (internal quotation marks and alterations omitted). When evaluating the narrow tailoring of the classification, the Court must determine whether the Department's program ensures "that each [grant] applicant is evaluated as an individual [entity] and not in a way that makes an applicant's [religion] the defining feature of [its] application." *Fisher* v. *Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

The Department did not properly evaluate Trinity Lutheran's application and thus its grant program was not narrowly tailored regardless of the existence of any compelling interest. Trinity Lutheran was advised that its application ranked fifth out of forty-four applications in 2012. Pet. App. 3a. Fourteen projects were funded that year, but Trinity Lutheran's was not one of them. *Id.* In a letter, the Department gave one sole reason for its rejection of Trinity Lutheran's application: After "further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application" due to the fact that "Article 1, Section 7 of the Missouri Constitution specifically provides that 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion.'" *Id.*

The fact that Trinity Lutheran was fifth on the Department's list shows that it was qualified for the program, and would have received one of the fourteen grants awarded in 2012 *but for* its status as a religious organization. This means that when evaluated as an individual institution, Trinity Lutheran was qualified for the program, but its status as a church prevented it from receiving a grant. This sort of evaluation of an institution based on nothing more than its status as a religious organization patently fails the narrow-tailoring requirement. *See Fisher*, 133 S. Ct. at 2420.

Trinity Lutheran applied for a grant to improve its playground—a clearly secular purpose. The Department did not consider that purpose, however; rather, it simply rejected Trinity Lutheran's application because it was a church. Narrow tailoring in this context would require consideration of whether the particular expenditure serves to establish religion. *See Grutter*, 539

U.S. at 333. Because the Department did not take this into account, its program is not narrowly tailored.

Trinity Lutheran brought a suspect classification Equal Protection claim, which stands apart from any Free Exercise claim it also brought. When properly evaluated under strict scrutiny, Trinity Lutheran's claim that the Department improperly discriminated against it on the basis of its status as a religious organization—a suspect classification—must succeed. The Department has identified no viable compelling interest and, even if it had, its program is certainly not narrowly tailored to any viable interest. Thus, this Court must hold that the Department violated the Equal Protection Clause when it denied the grant to Trinity Lutheran solely on the basis of religion.

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

MATTHEW T. MARTENS
Counsel of Record
ASHLEY E. BASHUR
WILLIAM OSBERGHAUS
DANIEL HARTMAN
KEVIN GALLAGHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

APRIL 2016